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Religion Clauses and NLRB Jurisdiction over Parochial Schools

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The Religion Clauses and NLRB Jurisdiction Over Parochial Schools

I. Introduction

Recently, the National Labor Relations Board (NLRB) granted jurisdiction over lay parochial school teachers.[1] This assertion of jurisdiction prompted religious authorities to challenge the Board's action in the federal courts. In *Bishop of Chicago v. NLRB*,[2] the bishop refused to bargain with a faculty union after the Board had claimed jurisdiction. The NLRB found an unfair labor practice in the bishop's refusal to bargain.[3] An appeal of the Board's findings brought the challenge to NLRB jurisdiction over parochial schools to the Seventh Circuit. *Caulfield v. Hirsh*[4] raised the same issue in a different manner. An injunction was sought in *Hirsh* to prevent the NLRB from conducting a representation election among lay elementary school teachers.[5]

In *Bishop of Chicago* and *Hirsh*, the application of the Labor Management Relations Act (LMRA)[6] to parochial schools was held to violate the first amendment.[7] Both courts used similar reasoning. They maintained that the collective bargaining sanctioned by the Act would deprive the bishop of ultimate authority over school policy.[8] Since the effect of the LMRA produced shared decision-making, the courts found that the Act violated the free exercise clause.[9] They also considered the relationship that the LMRA would require between the NLRB and the schools. The courts concluded that this relationship would entangle a state agency with a religious organization in violation of the establishment clause.[10]

The NLRB position in these cases, of course, disputed the conclusions reached by the courts. The Board, in *Bishop of Chicago*, characterized the LMRA as a general law embodying a legitimate state interest, the stabilization of labor relations. The NLRB further argued that any infringement of free exercise of religion resulting from the application of the Act caused only an incidental burden on this right. This sort of burden, the Board claimed, has traditionally been understood not to violate the first amendment.[11] In regard to the establishment issue, the NLRB maintained without elaboration that it would

1 Roman Catholic Archdiocese of Los Angeles, 223 N.L.R.B. 1218 (1976); The Catholic Bishop of Chicago, 220 N.L.R.B. 359 (1975); Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. 249 (1975).

2 559 F.2d 1112 (7th Cir. 1977), *cert. granted*, 98 S. Ct. 1231 (1978).

3 The Catholic Bishop of Chicago, 224 N.L.R.B. 1221, 1223 (1976).

4 95 L.R.R.M. 3164 (1977).

5 *Contra*, Grutka v. Barbour, 549 F.2d 5 (7th Cir. 1977) (injunction preventing NLRB from conducting representation elections and processing unfair labor practices against the bishop vacated because the district court lacked subject matter jurisdiction).

6 29 U.S.C. §§ 141-197 (1970 & Supp. IV 1975).

7 559 F.2d at 1130; 95 L.R.R.M. at 3180.

8 559 F.2d at 1123-24; 95 L.R.R.M. at 3175-80.

9 559 F.2d at 1130; 95 L.R.R.M. at 3178.

10 559 F.2d at 1128-29; 95 L.R.R.M. at 3178-79.

11 224 N.L.R.B. at 1222.

"accommodate" the religious nature of the schools in its proceedings. The Board contended that this "accommodation" respected the neutrality toward religion required by the establishment clause.[12]

Several distinct interests lie interwoven between the positions of the courts and the NLRB. On the one hand, the religious authorities seek to preserve their control over school policy. This interest is protected by their constitutional right to free exercise of religion. On the other hand, the lay teachers want to obtain the rights bestowed by the LMRA. These rights would enable the teachers to bargain collectively for higher salaries and better working conditions. Apart from the conflicting interests of school authorities and lay teachers lie the purely constitutional interests that limit the power of the state. These interests are embodied in the first amendment clauses protecting free exercise and prohibiting establishment of religion.

A complete evaluation of the positions taken by the courts and the NLRB must deal with these three interwoven interests. This task requires an examination of three topics: 1) the development of NLRB jurisdiction over nonprofit religious, charitable, and educational institutions, 2) religion clauses doctrine, and 3) the controlling principles of unfair labor practice law. These areas of constitutional and labor law put the issues raised into a legal perspective and provide an opportunity to appraise the relative merits of the rights concerned.

II. The Development of NLRB Jurisdiction Over Parochial Schools

A. *The Origins and Scope of the NLRB*

The NLRB was created in 1935 by the National Labor Relations Act (NLRA).[13] The NLRA was enacted to promote the stabilization of labor relations and to counteract the inferior bargaining position of individual employees with respect to that of employers.[14] To fulfill these purposes, the NLRA granted employees the right to unionize and to bargain collectively.[15] The Act, furthermore, made antiunion activities by employers illegal as unfair labor practices.[16] In 1947, the NLRA was subsumed by the LMRA. The latter Act added unfair labor practices by labor organizations to the original prohibitions.[17]

The statutory grant of jurisdiction to the NLRB extends to all disputes "affecting commerce."[18] Judicial interpretation has given the Board jurisdictional authority to the full extent of Congressional dominion under the commerce clause.[19] In view of the Supreme Court's expansive view of commerce, the

12 559 F.2d at 1128.
13 National Labor Relations Act, Ch. 372, §§ 1-13, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 141-197 (1970 & Supp. IV 1975)).
14 *Id.* § 1.
15 *Id.* § 7.
16 *Id.* § 8.
17 29 U.S.C. § 158(b) (1970 & Supp. IV 1975).
18 *Id.* §§ 159(c), 160(a).
19 NLRB v. Fainblatt, 306 U.S. 601, 606-07 (1938) (Act applicable to an employer whose own business involved no interstate commerce but which was engaged in processing materials shipped to and from the employer by foreign customers); NLRB v. Jones & McLaughlin Steel Co., 301 U.S. 1, 29-32 (1937) (NLRA applied to a single, local plant of a vertically integrated steel corporation). *See* NLRB v. Reliance Fuel Corp., 371 U.S. 224, 226 (1963) (per curiam).

NLRB possesses theoretical jurisdiction that is virtually unlimited in scope.[20] The Court has also determined that the responsibility to adapt the LMRA to changing patterns of industrial life belongs to the Board. The judiciary may only exercise "limited judicial review" as to whether the Board's determinations run contrary to the language or tenor of the Act.[21] The NLRB, however, has never fully exercised its statutory jurisdiction. Rather, it has adhered to self-imposed restrictions. Most of these jurisdictional limitations relate to the employer's gross revenue or level of out-of-state purchases and sales.[22] These prudential restrictions combined with the Board's case-by-case approach to jurisdictional questions provide the historical basis for its assertion of jurisdiction over the parochial schools.[23]

B. *The Historical Development of NLRB Jurisdiction Over Nonprofit Organizations*

From the passage of the NLRA to the enactment of the LMRA, the NLRB asserted jurisdiction over nonprofit charitable and religious employers. The NLRA defined "employer" without reference to nonprofit charitable, religious, or educational organizations.[24] The Board's claim of jurisdiction depended upon its case-by-case determination whether the employer's operations affected commerce. Prior to 1947, the NLRB thus maintained jurisdiction over a fraternal organization's insurance operations,[25] a professional organization's publishing concerns,[26] a church-operated publishing house,[27] and a charitable hospital.[28]

The evolution of NLRB jurisdiction was significantly altered by the events surrounding the passage of the LMRA. The original House bill exempted organizations "operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals."[29] The final draft of the bill enacted by Congress, however, exempted only nonprofit hospitals.[30] Following the enactment of the LMRA, the NLRB revised its

20 *See generally* Katzenbach v. McClung, 379 U.S. 294 (1964) (Court held that Congress had ample basis upon which to find that racial discrimination at restaurants which receive a substantial portion of their supplies from out of state impose a burden of national magnitude on commerce).

21 NLRB v. Weingarten, Inc., 420 U.S. 251, 266-67 (1970).

22 29 C.F.R. §§ 103.1 to 103.3 (1977).

23 For an in-depth historical analysis of the growth of NLRB jurisdiction over nonprofit charitable, religious and educational institutions, see Serritella, *The National Labor Relations Board and Nonprofit Charitable, Educational and Religious Institutions,* 21 CATH. LAW. 322 (1975); Sherman & Black, *The Labor Board and the Private Nonprofit Employer: A Critical Evaluation of the Board's Worthy Cause Exemption,* 83 HARV. L. REV. 1323 (1970); Note, *1974 Amendments to Labor Management Relations Act—Charitable Institution Exemption Eliminated,* 23 WAYNE L. REV. 1143 (1977).

24 Ch. 372 § 2, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 152 (1970 & Supp. IV 1975)).

25 Polish Nat'l Alliance, 42 N.L.R.B. 1375 (1942), *enforced as modified,* 136 F.2d 175 (7th Cir. 1943), *aff'd,* 322 U.S. 643 (1944).

26 American Medical Ass'n, 39 N.L.R.B. 385 (1942).

27 Christian Bd. of Publication, 13 N.L.R.B. 534 (1939), *enforced,* 113 F.2d 678 (8th Cir. 1940).

28 Cent. Dispensary and Emergency Hosp., 44 N.L.R.B. 533 (1942), *enforced,* 145 F.2d 852 (D.C. Cir. 1944), *cert. denied,* 324 U.S. 847 (1945).

29 H.R. REP. No. 245, 80th Cong., 1st Sess. 47 (1947).

30 29 U.S.C. § 152(2) (1970) (amended 1974).

jurisdictional policy. The new policy was stated in *Board of Trustees of Columbia University,*[31] in which the Board created a "worthy cause" exemption. The NLRB relied on the House Minority Report to the original bill in articulating the reasons for the change. The Report maintained that the Board had asserted jurisdiction over nonprofit entities only in "exceptional circumstances and in connection with [their] purely commercial activities."[32] Thus, after the passage of the LMRA, the Board refused to assert jurisdiction over a private university,[33] a church-operated radio station,[34] a YMCA,[35] a research institute,[36] a nonprofit book exchange,[37] and a nonprofit symphony orchestra.[38]

Not all nonprofit entities, however, were exempted by the Board from its jurisdiction after the passage of the LMRA. The NLRB asserted jurisdiction over nonprofit organizations when it found their operations "purely commercial" in nature.[39] In practice, however, the Board looked to the profit-making or nonprofit purposes of the employer. It failed to consider the nature of the work performed by the employees seeking to invoke the jurisdiction of the NLRB.[40] For example, the Board claimed jurisdiction over a nonprofit research institute with no university affiliation;[41] whereas, it declined jurisdiction over several similar institutes connected with universities.[42]

In the 1970 case of *Cornell University,*[43] the NLRB reached a turning point in its jurisdictional decisions concerning nonprofit entities. The Board abolished its policy of declining jurisdiction over nonprofit institutions of higher education as a class, expressly overruling *Trustees of Columbia University.*[44] The NLRB did not establish a dollar-volume standard for asserting jurisdiction over institutions of higher education. Rather, the Board maintained that the institutions before it, Cornell and Syracuse universities, unquestionably affected commerce.[45] After *Cornell,* the NLRB issued an administrative rule limiting its jurisdiction over this class to those institutions with gross annual revenues exceeding one million dollars.[46]

The exception for institutions of higher education to the "worthy cause" exemption created by *Cornell* developed into a trend. First, it was extended to

31 97 N.L.R.B. 424 (1951).
32 H. CONF. REP. No. 510, 80th Cong. 1st Sess. 32 (1947).
33 Trustees of Columbia Univ., 97 N.L.R.B. 424 (1951).
34 Lutheran Church Mo. Synod, 109 N.L.R.B. 859 (1954).
35 YMCA of Portland, Or., 146 N.L.R.B. 20 (1964).
36 Univ. of Miami, Inst. of Marine Science Div., 146 N.L.R.B. 1448 (1964).
37 United States Book Exch., 167 N.L.R.B. 1028 (1967).
38 Philadelphia Orchestra Ass'n, 97 N.L.R.B. 548 (1951).
39 Drexel Home, Inc., 182 N.L.R.B. 1045 (1970) (home for the aged); Sunday School Bd. of S. Baptist Convention, 92 N.L.R.B. 801 (1950) (church-owned publishing house of religious literature); Port Arthur College, 92 N.L.R.B. 152 (1950) (commercial radio station operated by an educational institution).
40 Sherman & Black, *supra* note 23, at 1339-43.
41 Woods Hole Oceanographic Inst., 143 N.L.R.B. 568 (1963).
42 Univ. of Miami, Inst. of Marine Science Div., 146 N.L.R.B. 1448 (1964). *See also* Mass. Inst. of Technology (Computation Center), 152 N.L.R.B. 598 (1965); Leland Stanford Jr. Univ., 152 N.L.R.B. 704 (1965).
43 183 N.L.R.B. 329 (1970).
44 *Id.* at 334. *See* text accompanying notes 31-33 *supra.*
45 The uncontested facts in *Cornell* stated that Syracuse University's annual operating budget amounted to $66 million, including out of state purchases of $5 million. Similarly, Cornell University's annual expenditures were fixed at $142,300,000. 183 N.L.R.B. at 331.
46 29 C.F.R. § 103.1 (1977).

secondary schools, both nonprofit[47] and proprietary.[48] The NLRB refused, however, to assert jurisdiction over two nonprofit religious educational organizations.[49] In both cases the schools taught only ecclesiastical subjects. Neither institution conferred the equivalent of a secular academic degree upon the completion of its curriculum alone. The Board declined jurisdiction based on the completely religious nature of each organization.[50]

Beyond the completely religious criterion, the NLRB has implemented the governmental nexus test to preclude the assertion of its jurisdiction over educational institutions. Where the employer and the state were closely related through public financing, the Board declined jurisdiction.[51] It developed this test because the LMRA explicitly excludes national and state governments and their political subdivisions from the NLRB's jurisdiction.[52]

In the context of this evolution, the NLRB considered the question of Board jurisdiction over parochial secondary schools.[53] The Board distinguished these institutions from completely religious organizations, because the schools were fully accredited to confer the equivalent of a secular academic degree.[54] The NLRB also maintained that the LMRA did not support or interfere with religious beliefs.[55] Having made these determinations, the Board used the same jurisdictional standard applicable to other private educational institutions. Thus, it granted jurisdiction over parochial secondary schools.[56]

From a historical perspective, therefore, two events have played a significant role in the NLRB's jurisdictional policies. First, the passage of the LMRA marked the beginning of the "worthy cause" exemption and the NLRB's denial of jurisdiction over most nonprofit entities. Second, the *Cornell* decision initiated the erosion of that exemption and began the Board's assertion of jurisdiction over most nonprofit organizations. The exemption remains intact for educational institutions characterized by the NLRB as completely religious. It may also still exist for organizations where the employer is primarily financed by the government. Beyond these exceptions, however, the Board uses a single jurisdictional

47 Shattuck School, 189 N.L.R.B. 886 (1971).
48 Windsor School, Inc., 200 N.L.R.B. 991 (1972).
49 Bd. of Jewish Educ. of Greater Washington D.C., 210 N.L.R.B. 1037 (1974); Ass'n of Hebrew Teachers of Metropolitan Detroit, 210 N.L.R.B. 1053 (1974).
50 The NLRB also began to abandon the "worthy cause" exemption in its dealings with other nonprofit entities. The Board granted jurisdiction over two nonprofit child care centers in The Children's Village, 186 N.L.R.B. 953 (1970) and Jewish Orphan's Home of Southern California, 191 N.L.R.B. 32 (1971). The NLRB reversed its position concerning its jurisdiction over nonprofit charitable child care centers in 1974. Mission of Our Lady of Mercy, 212 N.L.R.B. 855 (1974); Crotched Mountain Foundation, 212 N.L.R.B. 420 (1974); West Oakland Home, Inc., 211 N.L.R.B. 755 (1974); Ming Quong Children's Center, 210 N.L.R.B. 899 (1974). The Board, however, has subsequently overruled its 1974 jurisdictional policy regarding nonprofit charitable child care centers. In Rhode Island Catholic Orphan Asylum, 224 N.L.R.B. 1344 (1976), the NLRB adopted a single jurisdictional standard for both charitable and profit-making employers.
51 Howard Univ., 211 N.L.R.B. 247 (1974); Temple Univ., 194 N.L.R.B. 1160 (1972). *But see* Lutheran Welfare Services of Ill., 216 N.L.R.B. 518 (1975) (Board jurisdiction asserted, despite the fact that the educational and custodial services were funded by the Model Cities Program).
52 29 U.S.C. § 152(2) (1970 & Supp. IV 1975).
53 *See* note 1 *supra*.
54 216 N.L.R.B. at 250.
55 223 N.L.R.B. at 1218; 220 N.L.R.B. at 359.
56 223 N.L.R.B. at 1221; 220 N.L.R.B. at 360; 216 N.L.R.B. at 251.

standard over profit-making and nonprofit employers alike.

The NLRB applied both the completely religious and the governmental nexus tests in deciding to assert jurisdiction over parochial schools. The Board held that none of the schools fell within the completely religious exemption.[57] It also found that the employers were not primarily financed by national, state, or local governments.[58] In addition, as previously noted, the NLRB maintained that the provisions of the LMRA neither supported nor interfered with religious beliefs. The Board's assessment of these three factors combined with its private school precedents determined the outcome of its single jurisdictional standard test. Since it had already granted jurisdiction over private secondary educational institutions,[59] the Board asserted jurisdiction over the parochial schools. In so doing, it had applied its criteria consistently.

III. The Judicial Response to NLRB Jurisdiction Over Parochial Schools

Notwithstanding the NLRB's faithful application of its jurisdictional standards, the courts voided its assertion of jurisdiction over parochial schools. The Seventh Circuit in *Bishop of Chicago* directly overruled the Board's decision.[60] The District Court for the Eastern District of Pennsylvania in *Hirsh* enjoined the NLRB from conducting a representation election.[61] The rationale of both courts followed substantially the same line of reasoning. Consequently, an examination of the judicial response to NLRB jurisdiction need only focus on one of these opinions. For this purpose, the Seventh Circuit's decision is discussed, because it furnishes both the more fully articulated opinion and the higher judicial authority.

In *Bishop of Chicago,* the court recognized that the LMRA applied to private educational institutions.[62] It narrowly defined the issue to "whether the Board's exercise of jurisdiction over the [parochial] schools constitute[d] an improper breaching of the separation wall [between church and state] provided by the Religion Clauses of the First Amendment."[63] In holding that NLRB jurisdiction over these schools violated the first amendment,[64] the Seventh Circuit found infractions of both religion clauses.

The court discussed two areas concerning the right to free exercise of religion. The first question involved the Board's threshold determination of the completely religious or religiously associated nature of an institution. The Seventh Circuit maintained that the resolution of this inquiry would necessarily require the NLRB to measure the religiosity of each school.[65] This sort of examination, the court concluded, was beyond the Board's discretion as a matter of constitutional doctrine.[66]

57 223 N.L.R.B. at 1218; 220 N.L.R.B. at 359; 216 N.L.R.B. at 250.
58 223 N.L.R.B. at 1219; 220 N.L.R.B. at 360; 216 N.L.R.B. at 250.
59 *See* notes 47-48 *supra.*
60 559 F.2d at 1130.
61 95 L.R.R.M. at 3180.
62 559 F.2d at 1115.
63 *Id.* at 1118.
64 *Id.* at 1130.
65 *Id.* at 1120.
66 *Id.* at 1120-23.

The NLRB contended in *Bishop of Chicago* that the invalidation of the threshold question would require it to assert jurisdiction over all religious schools.[67] The Board's position compelled the Seventh Circuit to reach the second free exercise of religion concern. This matter involved the impact of faculty unionization upon the bishop's authority over school policy. The court maintained that the act of union certification would alter and infringe upon the religious character of parochial schools. It argued that the bishop would be forced to share decision-making authority with union representatives regarding employment terms. The Seventh Circuit then contended that collective bargaining would result in the conversion of academic policy to conditions of employment. This consequence, it concluded, would impair the bishop's authority to maintain parochial schools in accordance with ecclesiastical concerns.[68]

Beyond the free exercise implications, the Seventh Circuit raised establishment objections regarding the application of the LMRA to parochial schools. It posed a hypothetical situation involving the discharge of a lay teacher.[69] The court postulated that the employee could allege that he had been fired because of his union activity. On the other hand, the employer could charge that the instructor taught heresy. The court argued that the NLRB would have either to determine the validity of the heresy charge, an ecclesiastical matter, or to accept and enforce the opinion of the religious hierarchy. In the former situation, the Board would infringe on the bishop's free exercise of religion.[70] In the latter circumstance, the NLRB would violate the establishment clause by binding the parties to the decision of ecclesiastical authority.[71] The Seventh Circuit thus held that no "accommodation" of the religious character of the schools by the NLRB could withstand first amendment scrutiny.[72]

IV. Religion Clauses Doctrine

A controversy regarding the constitutionality of applying the LMRA to lay teachers thus exists. Both the NLRB and the courts have based their positions upon the Supreme Court's interpretation of the first amendment religion clauses. Three distinct contexts have provided the Court with religion clauses issues: 1) state funded aid to parochial schools, 2) the interaction of the religion clauses with compelling state interests, and 3) civil court involvement with ecclesiastical disputes. A complete evaluation of the applicability of the LMRA to parochial schools requires an analysis of all three contexts. Only this sort of analysis can examine the issue in the full context of the religion clauses.

A. *The Financial Aid Principles*

The Supreme Court has held in its parochaid decisions that the Constitu-

67 *Id.* at 1123.
68 *Id.*
69 *Id.* at 1125.
70 *Id.*
71 *Id.* at 1128.
72 *Id.* at 1130.

tion requires states to maintain strict neutrality toward religion.[73] As the Court explained in *Walz v. Tax Commissioner*,[74] this doctrine demands that "no religion be sponsored or favored, none commanded, and none inhibited." To achieve the requisite neutrality, the state must confine its activities to secular tasks and avoid aiding religious activities. The state and religious authorities, moreover, must remain separate.[75]

The parochaid cases have produced a three-prong test as a result of the cumulative effect of implementing the neutrality doctrine.[76] First, the Court must look at the legislation. An act can survive constitutional scrutiny if its purpose is secular.[77] Second, the primary effect of the legislation can neither advance nor inhibit religion.[78] Third, the statute cannot foster excessive entanglements between the state and religion.[79]

The doctrine of neutrality and the resultant three-prong test have evolved to protect religious freedom as embodied in the first amendment. In terms of the free exercise clause, they oppose state action infringing upon the absolute freedom to hold religious beliefs and opinions.[80] The impact of neutrality and the three-prong test in regard to the establishment clause, however, cannot be defined as clearly. A law may respect the establishment of a religion without promoting a state religion.[81] Additionally, legislation bestowing equal benefits to all religions also raises establishment implications.[82] Yet not every law furnishing "indirect," "remote," or "incidental" benefits upon religion fails to satisfy the constitutional requirement.[83] The establishment clause resists three main evils: sponsorship,

73 *See* Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 747-48 (1976) (state subsidies to sectarian institutions of higher education constitutional); Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 792 (1972) (state financial aid to parochial elementary and secondary schools unconstitutional); Walz v. Tax Comm'r, 397 U.S. 664, 669 (1970) (local property tax exemption for religious organizations constitutional); Bd. of Educ. v. Allen, 392 U.S. 236, 242 (1968) (free loan of public school textbooks to parochial schools constitutional); Zorach v. Clauson, 343 U.S. 306, 313-14 (1952) (release of public school students during school hours to attend religious instruction or services constitutional).

74 397 U.S. at 669.

75 426 U.S. at 747-48.

76 Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (state subsidies to parochial school teachers teaching secular subjects unconstitutional). *See* Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 772-773 (1973) (state aid to parents of parochial school children and for sectarian school buildings unconstitutional); Hunt v. McNair, 413 U.S. 734 (1973) (state bond issue to finance construction of educational facilities at sectarian institutions of higher education constitutional); Sloan v. Lemon, 413 U.S. 825 (1972) (state funded partial tuition reimbursements to parents of parochial school students unconstitutional); Tilton v. Richardson, 403 U.S. 672, 678 (1971) (federal grants to sectarian institutions of higher education constitutional).

77 Epperson v. Arkansas, 393 U.S. 97, 107-09 (1968) (unconstitutional to prohibit by statute the teaching of the theory of evolution in public schools).

78 School Dist. of Abington Township v. Schemp, 374 U.S. 203 (1963) (daily Bible reading ceremony in public schools unconstitutional); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing law constitutional).

79 Braunfeld v. Brown, 366 U.S. 599, 603-04 (1961) (Sunday closing law constitutional); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (statute requiring official certification of *bona fides* of a religious cause before funds can be solicited in its behalf unconstitutional); Reynolds v. United States, 98 U.S. 145, 166-67 (1887) (right to free exercise of religion provides no defense to a criminal prosecution for polygamy).

80 397 U.S. at 671-72.

81 403 U.S. at 612.

82 Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (state law providing free bus service to parochial school students constitutional).

83 *Id.;* 366 U.S. at 450.

financial support, and active involvement in religious activity.[84] Consequently, the neutrality doctrine and the three-prong test are also designed to oppose these infractions of the first amendment.

The three-prong test, then, provides an analytical tool for evaluating the inevitable relationships between religious organizations and the state. The test focuses on the form of the relationship to aid in deciphering its substance. Ultimately, however, the nature of the relationship, as determined by the three-prong test, will resolve whether the statute possesses the required neutrality.

The three-prong test concentrates first on the stated purpose of the legislation and then on its effect. If either of these factors supports or inhibits religion, the statute violates the first amendment. An act may pass the first two prongs of the test, however, and still fail to survive constitutional scrutiny on the basis of entanglement. Initially, the entanglement probe examines the character and purpose of the benefited or inhibited institutions. Then it considers the nature of the state's promotion or regulation of religion. Finally, the test inquires into the relationship between the state and the religious authority.[85]

The three aspects of the entanglement prong basically probe the nature of a particular relationship between the state and a religious organization. They provide an analytical framework in which to assess the state's activity resulting in the promotion or inhibition of religious exercise. The entanglement inquiry necessarily looks to the degree of state interaction with religion. It recognizes that the separation of church and state cannot mean an absence of all contact. Thus, a "minimal" or "remote" connection causes no first amendment violation. An "excessive involvement" of activity requiring "official and continual surveillance," however, will not pass constitutional scrutiny.[86]

The constitutional consequences of the application of the LMRA to parochial schools can only be partially analyzed with the three-prong test. Implicitly, the Seventh Circuit in *Bishop of Chicago* conceded the secular purpose of the Act, because it never addressed that issue. The court was concerned, however, with the LMRA's effect on the religious authorities' free exercise of religion.[87] It also stressed the entanglement issues raised by submitting parochial schools to NLRB jurisdiction.[88] The court's analysis in these two areas, however, needs to be supplemented.

The LMRA was enacted as a general law with a secular purpose, the promotion of harmonious labor relations. The scope of the Act's jurisdiction is directed at employers and employees. The LMRA exempts several significant classes of employers—public employers, railroads, and airlines.[89] It also excludes one significant class of employees—agricultural laborers.[90] Beyond these exemp-

84 397 U.S. at 668.
85 403 U.S. at 615.
86 397 U.S. at 674-75.
87 *See* text accompanying notes 67-68 *supra.*
88 *See* text accompanying notes 69-72 *supra.*
89 29 U.S.C. § 152(2) (1970 & Supp. IV 1975). Most federal employees have been granted the right to organize and to bargain collectively by an Executive Order. Exec. Order No. 11,491, 3 C.F.R. 191 (1969). State employees also have benefited from similar rights under state labor laws. In addition, the labor relations of railroad and airline employers are regulated by the Railway Labor Act. 45 U.S.C. § 151-188 (1970).
90 29 U.S.C. § 152(3) (1970 & Supp. IV 1975).

tions, the Act's potential reach extends to all employer/employee relationships affecting interstate commerce.[91]

In addition, the LMRA focuses narrowly upon the employment relationship. It affects the discretion of employers only to the extent that it prohibits them from committing unfair labor practices. These restrictions on the employers' conduct protect the rights of employees. They do not otherwise directly affect the employers' managerial discretion.

The LMRA's effect on the academic policies of religious schools thus occurs indirectly. The constitutionality of this effect, therefore, depends upon whether incidental burdens on religious exercise by general laws violate the first amendment. In addition, entanglement concerns require a determination whether NLRB jurisdiction over parochial schools creates an official and continuous relationship between the state and a religious enterprise. These issues raise additional questions regarding the extent of civil jurisdiction over ecclesiastical controversies which dispose of civil disputes. Hence, a complete analysis of the application of the LMRA to lay teachers must incorporate these considerations into the three-prong test.

B. *The Interaction of the Religion Clauses with Compelling State Interests*

The second part of the three-prong test examines the primary effect of the legislation in question on religious activity. This analysis acknowledges that there exists a permissible scope of state action that affects the practice of religion. As long as the primary purpose of the state activity remains secular, incidental effects upon religious exercise can occur. For this reason, the test's inquiry focuses only upon the primary effect of the act. Thus, the second prong of the test depends upon the extent of the constitutionally recognized scope of government regulation or encouragement of religious activity.

Basically, the Constitution embodies a dual approach to religion. On the one hand, neither the inhibition nor the advancement of religion can be compelled by law. On the other, state action cannot interfere with the free exercise of religion. The protection of society, however, demands that conduct be subject to regulation. The state's regulation of behavior, nevertheless, cannot unduly burden the protected freedom.[92] Consequently, the freedom to believe remains absolute but the freedom to act is qualified.

The flag salute cases demonstrate the priority the Supreme Court has placed on the state's right to enact general laws which infringe incidentally on religious action. In *Minersville School District v. Gobitis,*[93] a public school's daily flag-salute ceremony was challenged as contrary to the religious beliefs of two students. Looking at the historical development of religious toleration, the Court

91 The NLRB, however, has never exercised its jurisdiction to the fullest extent. The Board has voluntarily refused to assert jurisdiction over large numbers of employers. In general, the NLRB has declined to take cognizance of employers who are not thought to have a significant effect on commerce. For a discussion of these prudential limitations, see A. Cox, D. Bok, & R. Gorman, Labor Law 97-98 (1977).

92 Braunfeld v. Brown, 366 U.S. 599, 603-04 (1961); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). *See* Reynolds v. United States, 98 U.S. 145, 166-67 (1878).

93 310 U.S. 586 (1940).

upheld the school district's position. It explained that conscientious scruples have not relieved the individual from obedience to a general law not intended to promote or restrict religious beliefs.

The Supreme Court could have reversed *Gobitis* in *West Virginia Board of Education v. Barnette*,[94] in which it faced a similar challenge to a public school flag-salute ceremony. Instead, the Court sustained the challenge but did not do so on the basis of the religion clauses. It struck down the flag-salute ceremony as violating the right to freedom of expression.[95]

By basing its *Barnette* holding upon the right to freedom of expression, the Court left its *Gobitis* rationale intact. As a result, the primary effect test has developed to provide the basis for subsequent Supreme Court decisions. The Court has used the test both by itself and as part of the three-prong test. In either use two criteria are applied. First, the purpose or effect of the law is examined. If the act impedes the observance of one or more religions or discriminates invidiously, then the law violates the Constitution. This result follows even if the effect of the legislation may be characterized as indirect.[96] The state, however, can legitimately exercise its police power to promote health, safety, and general welfare.[97] In so doing, it may enact general laws whose purpose and effect advance the state's secular goals. These regulations do not violate the Constitution even if they also inflict an incidental burden on religious observance.[98] An exception to this principle exists where the state could accomplish its purpose by means which do not impose such a burden.[99]

The second criterion is used only after a legitimate exercise of the police power has been determined. It involves a balancing test to discover if an exception to the religion clauses is merited. The balancing process focuses initially on the interest the state seeks to promote by the statute. Next, the impediment to those objectives that would result from an exemption claimed under the free exercise clause is considered. Finally, the balancing test requires the state to demonstrate the adverse effect of such an exemption.[100] To do so, it must show with particularity how the state's strong interest, as embodied in the statute, would be unfavorably affected.[101]

The primary effect test should play a significant part in analyzing whether the application of the LMRA to parochial schools violates the first amendment. It will indicate whether the Act falls within the permissible scope of state action affecting the practice of religion. This finding will furnish the conclusion for the second part of the three-prong test.

In particular, the primary effect test will characterize the nature of the

94 319 U.S. 624 (1943).
95 *Id.* at 642.
96 366 U.S. at 607.
97 Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (compulsory school attendance laws held to violate the free exercise right of Amish parents to provide alternative education to their children).
98 *Id.* at 220-21; Sherbert v. Verner, 374 U.S. 398, 403 (1963) (unconstitutional to withhold unemployment compensation from a Seventh-Day Adventist who refused employment requiring that she work on her Sabbath); 366 U.S. at 607.
99 406 U.S. at 220-21; 366 U.S. at 607.
100 406 U.S. at 221.
101 *Id.* at 236.

LMRA's effect on parochial schools. If the Act primarily impedes the school authorities' free exercise of religion, then its application to parochial schools infringes on the first amendment. Alternatively, if the LMRA incorporates a valid exercise of the police power, then it incidentally burdens religious exercise. Absent a less intrusive means to accomplish the Act's purpose, no *per se* violation of the religion clause occurs. When no *per se* violation exists, the second criterion would weigh the need for an exception to the LMRA for parochial schools. The outcome of this balancing test would also depend upon the characterization of the Act's purpose and effect. The parochial schools would receive an exemption if the interest of the state advanced by the LMRA were not compelling.

The connection between the Board and religious authorities will come under further scrutiny in the entanglement analysis. The interaction between the NLRB and the schools would be limited primarily to the Board's jurisdiction over alleged unfair labor practices. Its jurisdiction in these matters is restricted by the same constitutional parameters as those imposed on civil courts. Thus, the three-prong analysis cannot be completed without an examination of the constitutional restraints on civil courts in disputes involving ecclesiastical doctrine.

C. *Ecclesiastical Disputes and Civil Courts*

In general, Supreme Court decisions concerning ecclesiastical doctrine have involved property disputes between the governing body of a hierarchical church and a minority faction. Originally, the Court, in *Watson v. Jones*,[102] adopted the common law rule precluding civil courts from deciding ecclesiastical questions. It, thus, confirmed the decision of the general church's governing body in the resolution of a property dispute between loyalist and recalcitrant factions. This narrow decision held that ecclesiastical issues could not be appealed to civil courts.[103] Consequently, religious tribunals were fixed as the sole arbiters of controversies hinging on church doctrine.

The common law principle was broadened in *Bouldin v. Alexander*.[104] In this case a local church had removed several of its trustees from office in violation of general church procedures. The Supreme Court acknowledged the right of the deposed trustees to obtain judicial relief. It recognized a right to inquire into the legitimacy of an act of church discipline. Thus, the court affirmed the trial court's reinstatement of the trustees.[105]

The principle allowing judicial inquiry into the decisions of ecclesiastical authorities was more clearly defined in *Gonzalez v. Roman Catholic Archbishop of Manila*.[106] This case differed from the previous ones because it did not involve an intrachurch dispute. The petitioner, a layman, claimed a chaplaincy as a legatee under a will. The Court held that his claim could be sustained only if he was qualified for the office. It further ruled that only church officials could

102 80 U.S. (13 Wall.) 679 (1871).
103 *Id.* at 714.
104 82 U.S. (15 Wall.) 131 (1872).
105 *Id.* at 139-40.
106 280 U.S. 1 (1929).

determine both the qualifications of a chaplain and if a candidate possessed them.[107] The Court maintained that the scope of judicial inquiry into matters of ecclesiastical doctrine was severely limited. The only issues subject to judicial review, it contended, were "fraud, collusion, or arbitrariness."[108]

More recently, the Supreme Court has integrated a first amendment rationale into the common law doctrine concerning ecclesiastical disputes. In so doing, the Court, in *Presbyterian Church in the United States v. Mary Elizabeth Hull Memorial Church,*[109] stated the constitutional doctrine of "marginal judicial involvement." This case involved a property dispute between two local churches and the general church. The state courts had considered church doctrine as it had existed at the time of the local churches' affiliation with the general church. They had compared this doctrine to the church teachings in existence at the time of the dispute. Based on deviations from the initial teachings, the state courts had held in favor of the local churches.[110] The Supreme Court reversed, ruling that the first amendment prohibited civil courts from resolving ecclesiastical disputes.[111] It held that civil courts could settle controversies involving religious doctrine only if no interpretation or consideration of the doctrine was required. The Court noted that one specific exception existed. Civil courts could participate in the narrow review of a particular ecclesiastical decision affecting civil rights for fraud, collusion, or arbitrariness.[112]

In enunciating this rule, the Supreme Court acknowledged that the first amendment severely circumscribed the role of civil courts in the resolution of church property disputes. It argued, however, that not every civil court decision involving property claimed by an ecclesiastical organization jeopardized the rights protected in the religion clauses. The Court reasoned that "neutral principles of law" developed for use in all property disputes could be applied without "establishing" religious authorities. It recognized the potential for both inhibition of the free development of religious doctrine and involvement of secular interests in purely ecclesiastical matters. The Court maintained, however, that civil courts could decide religious controversies as long as they did not resolve the underlying ecclesiastical doctrine.[113] Thus, "marginal judicial involvement" preserved the rights granted in the religion clauses. It prevented civil courts from deciding ecclesiastical questions. This doctrine, furthermore, prohibited the legal sanction of religious authorities deciding doctrinal issues when those decisions were based in fraud, collusion, or arbitrariness.

The doctrine of "marginal judicial involvement," however, was effectively abandoned by the Supreme Court in *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich.*[114] The Court explicitly held that no inquiry into the arbitrariness of decisions of the highest ecclesiastical tribunals of

107 *Id.* at 16-17.
108 *Id. See also,* Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Church, 393 U.S. 440 (1969); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).
109 393 U.S. 440.
110 *Id.* at 451-52.
111 *Id.* at 450-51.
112 *Id.*
113 *Id.* at 449.
114 426 U.S. 696 (1975).

a hierarchical church was allowable.[115] Thus, it reversed the state supreme court decision setting aside as arbitrary the findings of a church tribunal in an intrachurch property dispute. The majority required civil courts to accept the decisions of religious authorities on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.[116] It concluded that constitutional concepts of due process could not be applied to ecclesiastical matters.[117]

The dissent in *Milivojevich* objected that the majority had bound civil courts to enforcing by law any decree of a church tribunal. This left courts open to the enforcement of arbitrary lawlessness.[118] The minority compared religious organizations to voluntary secular associations and argued that no such deference was shown to those associations. It concluded that the majority had created even greater establishment problems in avoiding the free exercise concerns.[119]

The fact remains, however, that the civil courts lack jurisdiction over ecclesiastical issues. This restriction significantly affects the rights guaranteed by the LMRA when it is applied to parochial schools. The limitation bears most directly upon the NLRB's ability to hear unfair labor practice allegations. For example, the Seventh Circuit hypothesized that the discharge of a lay teacher could raise an issue based on ecclesiastical doctrine.[120] The religious basis of the employer's defense thus would present the NLRB with first amendment considerations. The *Milivojevich* rule prohibits the Board from hearing the merits of a doctrinal defense. Alternatively, if the NLRB enforced the decision of an ecclesiastical authority without reaching the merits, establishment concerns would be raised.

The complete lack of civil jurisdiction over ecclesiastical controversies affects the outcome of the primary effect and entanglement analyses. No definitive evaluation can be made, however, until the controlling principles of unfair labor practice law are examined. This body of law reveals how much evidence is required to support an alleged violation of the LMRA. It further indicates the amount of evidence needed to refute an alleged unfair labor practice.

V. The Controlling Principles of Unfair Labor Practice Law

The controlling principles of unfair labor practice law are grounded in the provisions of the LMRA. The Act grants employees specific rights in their relationship with employers.[121] The Supreme Court has recognized the right to organize guaranteed by the LMRA as fundamental.[122] The Act's protected activities, however, do not insulate employees from their employer's right to discipline and discharge them for cause.[123] Employers, however, cannot base the

115 *Id.* at 713.
116 *Id.*
117 *Id.* at 714-15.
118 *Id.* at 727 (Rehnquist, J., Stevens, J., dissenting).
119 *Id.* at 734 (Rehnquist, J., Stevens, J., dissenting).
120 *See* text accompanying note 69 *supra.*
121 29 U.S.C. §§ 157, 158(a) (1970 & Supp. IV 1975).
122 NLRB v. Jones & McLaughlin Steel Co., 301 U.S. 1, 33 (1936) (NLRA held to be a valid exercise of Congressional authority as applied to a single plant of a vertically integrated manufacturer).
123 29 U.S.C. § 160(c) (1970 & Supp. IV. 1975).

firing and disciplining of workers on antiunion animus.[124]

Judicial interpretation of the LMRA indicates that the employer's real motive for its actions is decisive. The Supreme Court has noted that Congress intended the employer's purpose in discriminating against union activity to be controlling.[125] The importance of motive in determining whether an unfair labor practice has occurred emphasizes the significance of the NLRB hearing. The Board's examination of an alleged unfair labor practice affords an opportunity to discover the facts. On the one hand, the mere suspicion of antiunion discrimination cannot provide the basis for finding a violation of the Act.[126] On the other, a simultaneously justifiable defense provides no excuse where union activity furnishes the real motive for disciplinary action.[127]

Three principles of controlling importance in the fact-finding process have been identified by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.*[128] At one extreme lies the situation in which the employer's discrimination against employees for their union activity results in the inherent destruction of employee rights. In this case, no proof of antiunion motivation is needed. The NLRB can find an unfair labor practice, even though the employer introduces evidence that its conduct was prompted by business considerations.[129] At the other extreme, the employer's antiunion discrimination causes a comparatively slight adverse effect. In this situation, the employee's representative must first establish the employer's antiunion animation to sustain the charge. The employer must then come forward with evidence of considerable business justifications for its conduct to refute a substantiated allegation.[130] Between these extremes, the employer's discriminatory conduct adversely affects employee rights to some degree. In this circumstance, the burden lies with the employer to establish that it was motivated by legitimate business objectives, because it can more easily obtain access to the proof.[131]

Most unfair labor practice allegations, therefore, require the employer to establish the lawful business reason for the employee's discharge. Thus, such

124 29 U.S.C. § 158(a)(3) (1970 & Supp. IV 1975). *See* NLRB v. Knuth Bros., 537 F.2d 950, 954-55 (7th Cir. 1976) (discharge of employee for acting in reckless disregard of employer's business interest upheld); Cannady v. NLRB, 466 F.2d 583, 586 (10th Cir. 1972) (discipline of employees not motivated by anti-union animus does not violate the LMRA); Kellwood Co., Ottenheimer Bros. Mfg. Div. v. NLRB, 411 F.2d 493, 497-98 (8th Cir. 1969) (discharge of a union member for poor productivity does not constitute an unfair labor practice); Corrivea & Routhier Cement Block, Inc. v. NLRB, 410 F.2d 347, 350 (1st Cir. 1969) (discharge of two employees for intimidation of other workers did not violate the LMRA); NLRB v. McGahey, 233 F.2d 406, 413 (5th Cir. 1956) (unfair labor practice to dismiss one employee to curtail his union activity but no unlawful discrimination in firing another as part of a reduction of production).

125 NLRB v. Brown, 380 U.S. 278, 286-87 (1965) (use of temporary replacements during a lockout of employees did not violate the LMRA).

126 NLRB v. Western Bank & Office Supply Co., 283 F.2d 603 (10th Cir. 1960) (insufficient evidence to sustain allegation that employee had been wrongfully discharged).

127 Wonder State Mfg. Co. v. NLRB, 331 F.2d 737, 738 (6th Cir. 1964) (unfair labor practice to fire a union organizer and a union sympathizer for carelessness in filling orders).

128 388 U.S. 26 (1967) (unfair labor practice for an employer to grant vacation pay only to those employees not participating in a strike).

129 *Id.* at 34; NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) (employer's offer of superseniority to striking employees and replacements who work during the strike held inherently destructive of employee rights).

130 388 U.S. at 34.

131 *Id.*

claims could involve the NLRB in the resolution of an ecclesiastical issue. The previously noted hypothetical situation involving a heresy defense to an unfair labor practice allegation would present such a case. The teaching of improper religious doctrine would constitute a genuine threat to the business interest of the employer. The controlling principles of labor law would require the school officials to prove the provisions of canon law defining heresy. In addition, the employer would need to establish that the teacher's conduct was included in that definition. Both of these tasks would involve the NLRB in matters of ecclesiastical doctrine, a result prohibited by the free exercise clause. The Board, then, could only avoid the determination of religious doctrine by deferring to the findings of a religious authority. This position was advocated by the NLRB in *Bishop of Chicago*.[132] The Seventh Circuit rejected the Board's proposed "accommodation" as an infraction of the establishment clause.[133] Thus, the final component of both primary effect and entanglement analysis depends upon the limitations on the NLRB in this situation.

VI. Evaluation of the Lay Teachers' Right to Organize

The foregoing discussion has raised the underlying interests at issue and the relevant legal principles concerning the application of the LMRA to parochial schools. The underlying interests in conflict consist of the religious authorities' control over school policy, the teachers' assertion of the rights granted in the Act, and the constitutional limitations on state regulation of religious organizations. An appraisal of these interests must consider them in the context of the pertinent principles of both constitutional and labor law. The result will determine whether the LMRA applies to parochial schools.

As previously explained, the format of this analysis must follow the three-prong test. The first step in this test considers whether or not the LMRA embodies a secular purpose. No serious doubt exists about the nonecclesiastical purpose of the Act. The Seventh Circuit, moreover, never disputed the secular objective of the LMRA.[134] Thus, the Act survives the first part of the three-prong test.

A. *The Primary Effect of the Application of the LMRA to Parochial Schools*

Since the LMRA satisfies the first aspect of the three-prong test, its primary effect must also be considered. One of the key facts in this analysis concerns the religious character of the schools. The NLRB held in *Bishop of Chicago* that the schools were religiously associated.[135] By this classification the Board acknowledged that the purpose of the schools embraced both religious and secular education. The Seventh Circuit criticized the NLRB's standard as being too simplistic

132 559 F.2d at 1128.
133 *Id.*
134 The Seventh Circuit did not specifically consider the purpose of the LMRA. In discussing the inhibiting effect of a bargaining order, it maintained that the policy considerations underlying the Act were sound. 559 F.2d at 1124. Presumably, the court believed that the Act contained a secular purpose.
135 220 N.L.R.B. at 359.

and made its own characterization of the religious nature of the schools.[136] The court did not base its assessment upon the facts stated in the record. Instead, it relied entirely upon the Supreme Court's description of the parochial schools in the parochaid cases as "religious pervasive institutions."[137] The court did so despite the fact that *Bishop of Chicago* involved neither state aid to parochial schools nor the parochaid schools. The Seventh Circuit particularly stressed the Supreme Court's characterization of the schools in *Lemon v. Kurtzman*.[138] Ironically, that opinion also disregarded the record before the Court. The *Lemon* majority maintained that in parochial schools "the teaching process is, to a large extent, devoted to the inculcation of religious values and beliefs."[139] This contention ignored the factual findings of the district court "that religious values did not necessarily affect the content of secular instruction."[140] The Seventh Circuit, like the *Lemon* majority, incorporated extrinsic facts about the nature of parochial schools into its opinion. In both cases, these facts were designed to substantiate the formulation of a particular policy. Thus, the court's primary effect analysis was influenced largely by its adoption of facts extraneous to the case.

The primary effect analysis is also used to evaluate the effect of faculty unionization on parochial school policymaking. The NLRB in *Bishop of Chicago* conceded that lay teacher collective bargaining would restrict the employer's unbridled exercise of administrative prerogative. The school officials would be forced to negotiate the employment conditions with the lay faculty's representative. This negotiation would initiate a sharing of decision-making where previously none had formally existed.[141] The Seventh Circuit seized upon the Board's narrow concession as an opportunity to introduce more facts from outside the record. These facts did not relate directly to the particular parties to the litigation but instead were of a general nature. The court relied upon a commentary by Professor Ralph Brown to establish these facts.[142] The article maintained that faculty unionization in higher education generally results in the transformation of academic policy to employment conditions.[143] The Seventh Circuit then asserted that further research had empirically proved Brown's thesis.[144]

The record in *Bishop of Chicago* did not establish to what degree the lay faculty was already consulted when school officials made academic policy decisions. It contained no facts regarding the union's contractual proposals affecting administrative policymaking. Additionally, the record did not contain existing contractual provisions concerning school policies from currently union-

136 559 F.2d at 1118.
137 *Id.* at 1120-22.
138 *Id.* at 1121.
139 403 U.S. at 618.
140 *Id.* at 667 (White, J., dissenting). *See* 403 U.S. at 618.
141 559 F.2d at 1123.
142 *Id.*
143 Brown, *Collective Bargaining in Higher Education,* 67 MICH. L. REV. 1067, 1075 (1969).
144 559 F.2d at 1123 (citing Kahn, *The NLRB and Higher Education,* 21 U.C.L.A. L. REV. 60, 80 (1973)).

ized parochial schools. More recent and extensive research, moreover, has defined distinguishable limits to Professor Brown's thesis,[145] thus disputing the "factual" basis of the court's opinion in *Bishop of Chicago*.

When facts outside the record are incorporated into the primary effect analysis, as in *Bishop of Chicago,* the investigation loses its relevancy to the case. By focusing on the constitutional rights in issue, the examination also obscures the importance of the competing interests in the case. The primary effect analysis fails to consider the interests of lay teachers in the parochial schools. As the number of lay faculty has grown,[146] the importance of this interest has increased.

Generally, the working conditions in parochial schools lag significantly behind those in public schools. The student-faculty ratio greatly exceeds that of public schools. Teachers are paid salaries well below parity with their public school counterparts. They, furthermore, are rarely provided with retirement plans and tenured positions.[147] Despite the dissimilarities in working conditions, lay teachers perform substantially the same tasks as public school teachers.

If the lay teachers are denied collective bargaining rights, their ability to alter these conditions will remain slim. The superior bargaining position of parochial school authorities allows them to exploit the overcrowded labor market for teachers. Without either a faculty union to assert the lay teachers' interests or the fear of a faculty's unionization, school officials lack an incentive to respond to the teachers' demands. The school authorities, therefore, offer employment on unnegotiable terms. This situation victimizes the lay teachers.

The nonapplication of the LMRA to parochial school teachers, furthermore, denies them rights granted to most other elementary and secondary school teachers. Currently, public school teachers in thirty-three states have the statutory right to organize.[148] In addition, teachers at private schools with no religious affiliation are included within the scope of the Act.[149] Admittedly, no *per se* right

145 Later studies indicate that faculty unionization creates a difference in tenor rather than substance regarding the faculty contribution to administrative policymaking. The faculty's voice in college and university governance has remained within the bounds set by the informal, traditional procedure. Thus, unionization has tended to replace existing informal procedures for consultation with formal, explicit contractual rights. Collective bargaining increased the professors' influence in only one circumstance. This occurred where prior procedures did not allow for informal faculty consultation consistent with that traditionally found at major universities. J. GARBRINO with B. AUSSIEKER, FACULTY BARGAINING 255-56 (1975). Unquestionably, lay teachers can be expected to bargain collectively for a role in academic policymaking. Elementary and secondary school administrators, however, have differed from their college and university counterparts. They have never consulted their faculty to the same extent concerning matters of school policy. By analogy, then, the lay faculty will most likely demand contractual rights consistent with the traditional, informal consultation of teachers found in major school systems. Thus, the contractual rights affecting school policymaking sought by lay teachers would differ significantly from those sought by college professors.

146 M. LARSON, WHEN PAROCHIAL SCHOOLS CLOSE 247-48 (1972).

147 *Id.* at 244-46.

148 The LMRA specifically exempts governmental employees, including public school teachers, from its scope in § 2(2). 29 U.S.C. § 152(2) (1970 & Supp. IV 1975). Many states, however, provide public school faculty members with a statutory right to organize including: Alabama, Alaska, California, Connecticut, Delaware, The District of Columbia, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, and Wisconsin. Other states, such as Illinois, allow public school teachers to organize without a specific statute granting the right. The right to unionize in these states is derived from the federal Constitution's protection of associational rights.

149 *See* text accompanying notes 47-48 *supra.*

to the protections of the LMRA exists. The denial of its benefits, however, in effect allows the continued exploitation of lay teachers by parochial school officials. The Act, moreover, was enacted to prevent employers from taking advantage of the inferior bargaining position of their employees. Thus, the purpose of the Act makes the lay teacher's bargaining rights a state interest.

The primary effect of the LMRA on the school authorities' right to free exercise of religion needs further consideration. The unsettled question that remains concerns the amount of infringement on that right the Act causes. The full extent of this burden can be assessed only by examining issues pertinent to entanglement. These issues concern the nature of the relationship between the religious authorities and the NLRB which the application of the LMRA to parochial schools would impose.

B. *Entanglement*

Entanglement investigation performs a dual task. Primarily, it strives to resolve whether a given tie between the state and a religious organization violates the establishment clause. Additionally, the investigation weighs factors which bear upon the primary effect of the legislation creating the relationship. Thus the entanglement inquiry examines considerations important in determining whether the application of the LMRA to parochial schools infringes on the religion clauses.

The Supreme Court's holdings have not demanded the complete separation of church and state. They have recognized that some relationship between both government and religious entities must inevitably occur.[150] The permissible scope of governmental activity affecting religious organizations generally includes legislation enacted under authority of the state's police power.[151] In *Lemon v. Kurtzman,* the majority opinion stated that "fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws . . . [constituted] necessary and permissible contacts."[152]

Compulsory attendance laws falling within the *Lemon* Court's category of "necessary and permissible contacts" usually impose restrictions on nonpublic school curricula. The judiciary has recognized the legitimate exercise of the states' police power in the regulating and licensing of parochial schools.[153] An

150 403 U.S. at 614.

151 King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir. 1974), *cert. denied,* 419 U.S. 996 (1975) (constitution held not to oblige FCC to relinquish its regulatory mandate so that religious sects may merge their licensed franchises completely into their ecclesiastical structures); Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879 (7th Cir. 1954), *cert. denied,* 347 U.S. 1013 (1954) (Fair Labor Standards Act held applicable to a corporation organized for religious purpose).

152 403 U.S. at 614.

153 Pierce v. Society of Sisters, 268 U.S. 510 (1925), provides the core of American jurisprudence relating to the state regulation of private and parochial schools. The Supreme Court in *Pierce* held a mandatory attendance law requiring all children affected by it to attend public schools unconstitutional. The Court reasoned that the state could not compel children to attend public schools, but it could regulate nonpublic schools:

> No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to

examination of a typical state school code indicates the extent of permissible state action limiting the discretion of parochial school authorities. Since one of the petitioners in *Bishop of Chicago* operated schools in Illinois, its School Code[154] has been selected for this purpose.

The Illinois School Code indirectly fashions the substance of nonpublic school curricula. Its compulsory attendance law requires all children between the ages of seven and sixteen to attend public schools. An exemption to the provision allows these children to fulfill the statute's requirement in private and parochial schools. To qualify their pupils for the exemptions, nonpublic schools must provide students with "the branches of education taught to children of corresponding age and grade in the public schools."[155] The Code further provides that the curriculum of the public schools shall be determined by the local school boards.[156] Through the compulsory attendance law, therefore, the state compels nonpublic schools to adhere to its standards and regulations and to the local school board's curriculum.

The School Code requires that instruction be performed in the English language;[157] it also compels public schools and thus by implication private and parochial schools to offer specific courses. For example, the curriculum of grades seven through twelve must include a course in "American patriotism and the principles of representative government." Not less than one hour per week, furthermore, must be devoted to this subject.[158] The Code also calls for instruction in the following areas: health,[159] physical education,[160] consumer education,[161] conservation of natural resources,[162] safety,[163] and United States History.[164]

The reach of state regulation significantly affects the curriculum of the parochial schools. This variety of "necessary and permissible contact" concerns matters which pertain to rights under both religion clauses. The indirect state regulation of the content of parochial school curricula limits the free exercise rights of the religious authorities. Nonpublic schools either offer a course of study similar in content to that of the public schools, or their students are not exempted from the compulsory attendance law. This curriculum constraint inflicts a substantial burden on the operation of parochial schools. At a minimum, they must commit large amounts of time and resources to the teaching of a curriculum

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good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Id. at 534. *See* 392 U.S. at 245-48. *See also* Sante Fe Community School v. New Mexico State Bd. of Educ., 85 N.M. 783, 518 P.2d 783 (1974) (requirements of compulsory attendance law held applicable to a private school); Packer Collegiate Inst. v. Univ. of State of New York, 273 App. Div. 203, 76 N.Y.S.2d 499 (1948), *rev'd on other grounds,* 298 N.Y. 184, 81 N.E.2d 80 (1948).

154 ILL. ANN. STAT. ch. 122, §§ 1-1 to 1214 (Smith-Hurd) (1961 & Supp. 1978).
155 *Id.* at § 26-1(1).
156 *Id.* at § 27-1.
157 *Id.* at § 26-1(1).
158 *Id.* at §§ 27-3, 27-4.
159 *Id.* at § 27-5.
160 *Id.* at §§ 27-5, 27-6.
161 *Id.* at § 27-12.1.
162 *Id.* at § 27-13.1.
163 *Id.* at § 27-17.
164 *Id.* at § 27-21.

dictated by the legislature and local public school board. Thus, compliance with the Code reduces the amount of time and resources available for religious instruction.

Beyond its free exercise implications, the Code also threatens the rights protected by the establishment clause. The School Code empowers the Superintendent of Public Instruction to inspect the facilities of nonpublic schools.[165] The Code also compels private and parochial schools to keep records and to submit reports periodically to the Superintendent.[166] The Superintendent gathers this information to advise the General Assembly and the Governor of nonpublic school conditions and the educational resources of the state.[167] The School Code further requires nonpublic schools to retain cumulative records of student physical examinations.[168] These sorts of tasks require the existence of an official and continual relationship between religious authorities and the state. Ordinarily, an entanglement inquiry would find this kind of relationship an infringement upon the establishment clause. The state interest in the regulation of education, then, must outweigh the burden on first amendment rights. This characterization of the state regulation of parochial schools prevents a successful constitutional challenge.

Compulsory attendance laws, therefore, compel parochial schools to undertake significant obligations. The application of the LMRA, however, does not impose similar responsibilities. The NLRB has previously asserted jurisdiction over parochial schools in Baltimore and Los Angeles.[169] These schools have not challenged the constitutionality of the LMRA since the faculty gained the right to bargain collectively. The current operation of parochial schools with unionized faculties indicates that teacher unions do not destroy the religious purpose of the schools. The continued existence of these unionized schools implies that the religious officials running them have not been deprived of their control over the curriculum.

The LMRA, moreover, requires no prolonged relationship between the state and a religious organization. The Act's effect on parochial school curricula depends upon union demands. The NLRB does not interact with an employer until an alleged violation of the LMRA has been raised.[170] The Board's jurisdiction extends no further than the regulation of employer-employee relations as defined by the LMRA.[171] As an administrative agency of the executive branch, the NLRB's remedial powers do not embrace the whole range of legal and equitable remedies. It may issue cease and desist orders to enjoin unfair labor practices. The Board further may require unlawfully discharged employees to be reinstated with or without compensation for their forced absence from work.

165 *Id.* at § 2-3.10.
166 *Id.* at §§ 2-3.10, 2-3.23.
167 *Id.* at § 2-3.211.
168 *Id.* at § 27.8.
169 *See* text accompanying notes 53-56 *supra. See also* Nazareth Regional High School v. NLRB, 549 F.2d 873 (2d Cir. 1977) (court ruled that the failure of the administration of a private religious high school that had replaced the prior diocesan school administration to bargain with the existing faculty union constituted an unfair labor practice; no constitutional issue was raised).
170 29 U.S.C. §§ 158, 160 (1970 & Supp. IV 1975).
171 29 U.S.C. §§ 152, 157, 158, 159, 160 (1970 & Supp. IV 1975).

Finally, the NLRB may require a violator to file periodic reports to demonstrate its compliance with the Board's order.[172] Thus, the LMRA focuses very narrowly on labor relations. Its effects and remedies influence the parochial school authorities' discretion much less than does the broad impact of compulsory attendance laws.

The NLRB's assertion of jurisdiction, moreover, extends to lay teachers only. Since no members of a religious order are included, the basis of its jurisdiction remains the contractual relationship between employer and employee. This fact deserves attention, because the commercial activity of parochial schools does not differ from that of other voluntary commercial organizations. They make contracts in the course of their operations. Disputes arising out of these agreements fall within the jurisdiction of civil authorities. In enacting the LMRA, furthermore, Congress did not grant an exemption from the Act's jurisdiction to religious organizations. As previously discussed, however, a civil court cannot decide ecclesiastical issues; therefore, neither can the NLRB. Thus, the LMRA operates in a manner quite similar to other laws affecting the commercial activity of the parochial schools.

The involvement of the NLRB in the labor relations of parochial schools, however, raises entanglement considerations. The heretic teacher hypothetical from *Bishop of Chicago* provides a concrete example. Parochial school authorities, like other employers, can protect their business interests by firing a teacher for cause. Since the school's purpose lies in education consistent with certain religious principles, heresy threatens to impair the employer's commercial welfare. A discharged lay teacher must establish a *prima facie* violation of the LMRA to pursue an unfair labor practice allegation against the school. Thus, the teacher must show that the school authorities acted out of antiunion motivation.

The *Milivojevich*[173] principle, however, prohibits the NLRB from deciding the merits of the employer's heresy defense. Rather, it requires the Board to accept the decisions of religious authorities regarding an ecclesiastical issue, such as heresy. This limited acquiescence by the NLRB does not deprive the Board of its entire jurisdiction over parochial schools. It removes from the NLRB only the resolution of disputes based on church doctrine. In addition, the lay teachers would secure the rights to unionize and to bargain collectively. This limitation on the Board, however, leaves room for substantial abuse by the religious authorities. They could effectively circumvent the enforcement of most unfair labor practice provisions[174] with justifications based entirely on ecclesiastical doctrine. The substantial circumvention of these rights would considerably impair the exercise of the other rights granted by the LMRA.

A better formulation of NLRB jurisdiction over the parochial schools would limit the *Milivojevich* rule to situations closer to its own facts, that is, to cases involving intrachurch disputes. In *Milivojevich,* the relationship between the parties was defined by the principles of canon law governing the ecclesiastical

172 29 U.S.C. § 160(c) (1970 & Supp. IV 1975).
173 *See* text accompanying notes 114-17 *supra.*
174 29 U.S.C. § 158(a) (1970 & Supp. IV 1975).

hierarchy. The resolution of the property dispute rested ultimately upon the church law concerning a bishop's bond to the mother church. Canon law, however, does not provide the foundation of the relationship between lay teachers and parochial schools. The terms of the employment contract determine this basis. Thus, civil law controls the employment agreement and disputes arising out of it.

In a situation like the heretic-teacher hypothetical, the disposition of an ecclesiastical issue resolves the dispute. Under these circumstances, the NLRB should be permitted to review a church tribunal's findings on the ecclesiastical issue. This civil review would be strictly limited to the narrow issues of fraud, collusion, or procedural arbitrariness. In the case of a heretic-teacher, the Board still would not be allowed to hear the merits of the school officials' heresy defense. It could review only whether, in fact, the proper ecclesiastical procedures had been followed to hold the teacher a heretic. Assume, for example, that canon law required a diocesan chancery office to determine the merits of all heresy allegations. School officials could assert a heresy defense to an unfair labor practice allegation in just one situation. This condition would exist only if they had received the chancery office's opinion affirming the teacher's heresy prior to firing him. This sort of inquiry would not require the NLRB to determine matters of church doctrine. It would, however, substantially reduce the potential abuse of ecclesiastically based defenses to unfair labor practices possible under the *Milivojevich* doctrine.

This formulation would reinstate the constitutional rule stated in *Hull*[175] but only insofar as nonintrachurch disputes were involved, thereby affording the "neutrality" which the establishment clause seeks to preserve. The state's intervention into the ecclesiastical controversies would be narrowly defined. It would, nonetheless, guard against the establishment of lawlessness by ecclesiastical fiat which can result by default under *Milivojevich*. The principle that the Supreme Court sought to preserve in that case would not be affected. Intrachurch disputes would continue to be governed by the decision of the ecclesiastical hierarchy.

The relationship of the NLRB to parochial schools, then, does not involve either continual and official surveillance or intervention in ecclesiastical doctrine. Thus, the LMRA only minimally affects the school officials' decision-making. Empirical evidence indicates that faculty unionization merely formalizes the traditionally existing informal joint faculty-administration policymaking procedures.[176] In addition, the experience of parochial schools with unionized faculties has not resulted in constitutional challenges to the Act. Thus, the LMRA survives the three-part analysis of the entanglement inquiry.

The completion of the entanglement analysis provides the information needed to complete the primary effect test. It revealed that the LMRA exerts only a minimal incidental restraint upon the free exercise rights of the school authorities. Thus, the LMRA also survives the primary effect analysis.

175 *See* text accompanying notes 109-13 *supra.*
176 *See* note 149 *supra.*

VII. Conclusion

A. *Results of the Religion Clauses Scrutiny*

The evaluation of the application of the LMRA to parochial schools, therefore, demonstrates that the Act withstands the first amendment challenge. This evaluation has incorporated all three areas of analysis concerned with the religion clauses. In effect, the compelling state interest doctrine and the rule that civil courts will not intervene in ecclesiastical issues have been incorporated into the three-prong test. No one of these analytical methods could assess fully the constitutionality of NLRB jurisdiction over parochial schools.

The results of this combined analysis conflict with those of the Seventh Circuit in *Bishop of Chicago.*[177] The difference between this appraisal and that of the court lies chiefly in factual considerations. For instance, the Seventh Circuit disregarded the NLRB's findings concerning the religious nature of the schools. Instead, it adopted facts extraneous to the record. These facts involved the nature of the schools and the effect of faculty unionization on the school authorities' decision-making. The appropriateness of these facts, however, was never tested by the rigors of the adversary process. The cases relied upon by the court to establish the religious nature of the schools dealt with both schools and issues different from those involved in *Bishop of Chicago.* The empirical research concerning faculty unionization suffered from similar defects. The research considered only colleges and universities; moreover, its results have been qualified by subsequent research. The Seventh Circuit neglected these significant factors in basing its decision on these extra-record facts. The court, furthermore, did not compare the pervasive effect of other constitutional exercises of the police power affecting parochial schools, such as compulsory school attendance laws, with that of the LMRA. It also did not recognize the limited jurisdiction and remedial power of the NLRB. The Seventh Circuit further failed to acknowledge the contractual basis of the relationship between lay teachers and the parochial school administration. At the very least, the conclusion of the court was not based sufficiently on the facts in the record. The combined religion clauses analysis, therefore, indicates that the Seventh Circuit decided the issue wrongly.

B. *The LMRA as Tempered by the Religion Clauses*

The court's decision in *Bishop of Chicago,* thus, failed to recognize how the religion clauses temper the LMRA's impact on parochial schools. The way in which the Act's application respects the interests of the school authorities, lay teachers, and the Constitution reflects this tempering of the LMRA's effect. First, the Act does not interfere with the school authorities' free exercise of religion. Since the Act embodies an important state interest, some incidental burden can constitutionally occur. The present operation of the LMRA in

177 This conclusion also disagrees with that of the court in Caulfield v. Hirsh, 95 L.R.R.M. 3164 (1977).

parochial schools indicates that the actual burden incurred is not constitutionally impermissible. Second, the Act grants the lay teachers specific protections in dealings with their employers. These protections will prevent the victimization of the teachers in labor relations with the school authorities. Third, the constitutional principles of the first amendment are not impaired by the application of the LMRA to parochial schools. Beyond respecting the free exercise rights of the school authorities, the Act complies with the establishment clause, because NLRB inquiries cannot consider ecclesiastical questions. This limitation on Board jurisdiction merely comports it with the same restriction placed on civil courts. Thus, the important national policy embodied in the LMRA can be applied to parochial schools without jeopardizing the rights guaranteed by the religion clauses.

—*Gerald M. Richardson*